SUPREME COURT, U.S.
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In The
Supreme Court of the United States

OFFICE OF THE CLERK

KENNETH RAY HYATT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a federal defendant presents newly discovered, expert evidence of malfeasance and false investigation by government agents involving flood insurance for hurricane repairs that likely have caused jury to acquit him, giving rise to "the imperative of correcting a fundamentally unjust conviction," *House v. Bell*, 547 U.S. 518, 536 (2006), does the district court's dismissal of a motion to vacate under 28 U.S.C. § 2255(4), after it assumed the defendant acted with due diligence, raise an important question of federal law worthy of a certificate of appealability under *Miller-El v. Cockrell* and *Tennard v. Dretke*?

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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term 2009

KENNETH RAY HYATT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Petitioner, Kenneth Ray Hyatt, respectfully requests this Court to issue a writ of certiorari to review the order of the United States Court of Appeals for the Fourth Circuit denying his application for a certificate of appealability and dismissing his appeal in this case. The Fourth Circuit's perfunctory denial of a certificate of appealability is inconsistent with the principles espoused in *Tennard v. Dretke* and *Miller-El v. Cockrell* and highlights a division among the circuits

with respect to the treatment of a request for a certificate of appealability. Moreover, the substantive claim concerns an important issue of the materiality of a federal defendant's newly discovered evidence necessary to satisfy the threshold for filing a motion to vacate under 28 U.S.C. § 2255(4). *See Rivas v. Fischer*, 294 Fed. Appx. 677 (2d Cir. 2008) (directing district court to examine credibility of government witnesses and relative strength of state's case); *see also House v. Bell*, 547 U.S. 518 (2006) (acknowledging newly discovered evidence may arise creating imperative to correct unjust conviction). To resolve this important question of federal law and create consistency among the circuits regarding when and how a certificate of appealability must be granted, this Court should issue its writ to resolve the issue.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Hyatt v. United States*, No. 08-8455, is unpublished and attached. [App. 1a-3a] The unpublished order of the United States District Court for the Eastern District of North Carolina denying a motion to vacate based on compelling, newly discovered evidence is attached. [App. 7a-13a]

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on 2 October 2009. [App. 4a] This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amend. V provides, in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Procedural History.

Kenneth Hyatt was convicted by a jury of conspiring to defraud the United States and mail fraud. *See* 18 U.S.C. §§ 371, 1341. It was affirmed. *United States v. Kennelly*, 84 Fed. Appx. 278 (4th Cir. 2003)(unpublished), *cert. denied*, 541 U.S. 1018 (2004). [App. 68a-72a]

After his release from incarceration, Mr. Hyatt first learned of an investigation and report to Congress done by Steven J. Kanstoroom, an expert in Pattern Recognition and Fraud Detection. Mr. Kanstoroom conducted a two-year investigation, involving over 6,000 hours of research and analysis, into the Federal Emergency Management Agency (FEMA) and many of its related entities that resulted in a comprehensive, written report to the Congressional Research Service. [App. 37a-40a, 43a-67a] As part of his investigation, Mr. Kanstoroom received "whistleblower" and "smoking gun" documents that "demonstrate[d] systemic problems within FEMA," including the intentional use of "low-ball" adjustments and the perpetration of "materially false and misleading information" that formed the basis for operations, audits, and prosecutions. [App. 30a-31a, 44a-46a] Among other

things, he found "government witnesses" gave "false and misleading testimony" to both the prosecuting authorities and to the district court that contributed to Mr. Hyatt's "wrongful conviction." [App. 51a-54a] Mr. Kanstoroom "believe[d] the evidence . . . could not have been found using reasonable diligence by the parties." [App. 31a, 66a-67a]

Based on this newly available and discovered information, Mr. Hyatt filed a motion to vacate the judgment. *See* 28 U.S.C. § 2255(4). The government moved to dismiss for lack of jurisdiction, *see* Fed. R. App. P. 12(b)(1), but did not dispute, in any way, Mr. Kanstoroom's position. Rather, the government moved to dismiss only on the basis of untimeliness. The district court "[a]ssum[ed] without deciding" that Mr. Hyatt exercised "due diligence," [App. 12a], but dismissed it because the newly discovered information was not "material to the issues," (without affording Mr. Hyatt any opportunity to respond and without conducting an evidentiary hearing), and, therefore concluded the motion was untimely. [App. 12a] The district court summarily characterized the new information as a "vague proffer," [App. 12a] despite the uncontested qualifications of Mr. Kanstoroom and his comprehensive, unchallenged report's indictment of

the government's theory, investigation, and testimony.[1] [App. 43a-67a]

Mr. Hyatt timely appealed. The Fourth Circuit summarily denied a certificate of appealability. *See* Fed. R. App. P. 22(b)(1). Like the district court, the Fourth Circuit dismissed the appeal without discussing why the issue Mr. Hyatt "presented [was not] adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. at 327 (citing *Slack v. McDaniel*, 529 U.S. 473, 481 (2000).

B. Summary of Evidence at Trial.

Ocean Dunes is a residential condominium complex at Kure Beach, North Carolina, consisting of twenty-five buildings with 196 separate units. These condominiums were devastated by Hurricane Fran in 1996. Concrete driveways and carports were torn apart. Sand beneath the buildings had been washed away, leaving holes as great as ten feet.

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[1]Even a cursory review of Mr. Kanstoroom's extremely detailed, focused, and documented report, which is found in full at App. 43a-67a, belies the district court's characterization of this compelling new evidence as a "vague proffer." The entire report was attached to the motion to vacate filed in the district court. [App. 14a-67a] Based on this presentation and the district court's unsupportable rejection of it, Mr. Hyatt certainly "deserve[d] encouragement to proceed further" with this claim in the Fourth Circuit. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Indeed, it offends even rudimentary notions of due process that a conviction would be allowed to stand in the face of this dramatic development, especially without the district or circuit court reviewing this issue on the merits. *See House v. Bell*, 547 U.S. 518, 536 (2006).

Wooden walls forming carports underneath the buildings had been shredded.

In the wake of the storm, insurance adjusters and contractors from around the nation came to North Carolina to get work rebuilding the area. The Ocean Dunes Homeowners Association began the insurance process for the Ocean Dunes condominium complex. Insurance Network Services (INS) retained approximately fifty independent claims adjusters to work on Fran-related insurance claims in the Wilmington area, including Donald Kennelly, who, because he was certified in all lines of flood insurance and had significant experience, was assigned 150 claims, including the Ocean Dunes claim, which was the largest. Although INS posted pricing guides in its office and distributed copies of guidelines received by National Flood Insurance Program, it did not give adjusters additional tools or aids for use in adjusting claims.

Meanwhile, Tim Price and Ken Hyatt came to the Wilmington area to obtain work repairing hurricane damage to property covered by insurance after the hurricane struck. Mr. Price and Mr. Hyatt became equal partners in Coastal Insurance Repairs, Inc. Coastal obtained an unlimited contractor's license in North Carolina. The new license enabled Coastal to obtain large jobs. The Ocean Dunes Homeowners Association selected Coastal to perform repairs.

By May 1998, Coastal had completed, with the exception of few final repairs, the reconstruction of Ocean Dunes. After determining that the work was

completed to the satisfaction of the homeowners, the Homeowners Association paid Coastal out of its general account.

At trial, the government introduced evidence relating to the scope of flood insurance and the price of labor and material. Through this evidence, the government claimed some of Mr. Kennelly's proofs of loss were improperly inflated through the use of unrealistically high prices for certain items included within them. The government's opinion witness, Thomas Vaughan, testified about the scope of flood insurance and the price of labor and materials. In preparation to testify about the prices of various repair items, Vaughan reviewed Ocean Dunes files received from the government but did not review the NFIP material or research the prices available in the aftermath of Fran. Rather, Vaughan simply remembered the prices he used when he worked as an adjuster after Fran, six years before the trial.

Ty Mueller, an agent with the Inspector General for FEMA, compared estimates produced by Mr. Kennelly during the claims process with bids provided by subcontractors. During Agent Mueller's testimony, while entertaining an objection from Mr. Hyatt, the district court began discussing with counsel its concerns regarding the government's meager proof of a conspiracy.

At the close of the government's case, Mr. Hyatt moved for a judgment of acquittal because the evidence was insufficient. Although the district court twice noted the "paucity of the evidence" of a connection between the defendants, it denied the

motions. Mr. Hyatt renewed his motion at the close of all the evidence. The district court again noted the "paucity of the evidence" and described the motion as a "very, very close call" but denied it.[2]

C. Summary of Newly Available Evidence.

The newly discovered evidence involves the result of an investigation by and report of Steven J. Kanstoroom, who is an expert in Pattern Recognition and Fraud Detection. [App. 33a-36a] In a letter dated 19 November 2005 to Rawle King, Insurance Analyst with Congressional Research Service, Mr. Kanstoroom describes a two-year investigation he conducted into FEMA and many of its related entities. [App. 29a-32a] As part of his investigation, Mr. Kanstoroom received "whistleblower" and "smoking gun" documents. In his expert opinion, Mr. Kanstoroom believed this information "demonstrates systemic problems within FEMA," including the intentional use of "low-ball" adjustments and the perpetration of "materially false and misleading information" that formed the

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[2]This district court's repeated description of the "paucity of the evidence" is important because it rejected Mr. Hyatt's claim of newly discovered evidence and denied the motion to vacate under section 2255 because it was merely cumulative of the cross-examination during the trial. If the evidence was as paltry as the district court believed when it heard the testimony, it is difficult to fathom how the same district court could consider Mr. Kanstoroom's detailed expert observations, which resulted from 6,000 hours of research, investigation, and analysis, and was a stunning indictment of the substance and legitimacy of the government's entire case against Mr. Hyatt, to have been immaterial under section 2255.

basis for operations, audits, and prosecutions, including "that key governments witnesses came to provide the false and misleading testimony" in Mr. Hyatt's trial. In Mr. Kanstoroom's expert opinion, the absence of this important evidence, which substantially disputed the government's claims of fraud and over-pricing, contributed to Mr. Hyatt's "wrongful conviction." He also felt Mr. Hyatt or his defense team could not have gathered this important evidence through the exercise of reasonable diligence.

Mr. Kanstoroom prepared a "Summary of Newly Discovered Evidence in the Case of the United States of America v. Donald Kennelly and Kenneth Ray Hyatt," dated 19 November 2005, that he submitted to the Congressional Research Service. [App. 43a-67a] This significant report contains findings that are unquestionably material to Mr. Hyatt's defense of the charges for which he was convicted. For example, Mr. Kanstoroom determined government witnesses mistakenly and erroneously testified that FEMA and its entities pay only for damages caused by direct water contact. This material information was incorrect. Similarly, he concluded government witnesses mistakenly and erroneously testified that amounts paid to Mr. Hyatt exceeded permissible amounts or were unreasonably high. This misinformation resulted from FEMA's intentional use of "low-ball" estimates. Government witnesses also inaccurately testified about water contact and pricing guidelines and gave the jury materially incorrect information about Mr. Hyatt in this regard. In fact, water contact is not a prerequisite for payment to cover hurricane and

flood damage at the time of Mr. Hyatt's work, contrary to the explicit testimony of several government witnesses. This erroneous testimony was particularly important because of the issue relating to the number of air conditioning units that were replaced based on whether they had been in direct contact with flood waters caused by the hurricane.

Furthermore, Mr. Kanstoroom found that much of the key testimony and evidence against Mr. Hyatt came from people without any training as an adjuster. This lack of training would have been pivotal to the weight the jury would have assigned the testimony. He also found the automated software programs used by FEMA and its agents to determine prices for reconstruction and replacement prices used in the industry were not uniform or even consistent. This new information was directly contrary to the explicit testimony of key government witnesses. Rather, there is "a wide variation in prices that amounts to hundreds of percent." Mr. Kanstoroom found "such programs are often used to low-ball insurances claims" and provides the rationale for these tactics. As a result, "the adjusters' 'approved prices' are often far lower than the fair price necessary to complete the repairs." These practices are "fraudulent." [App. 36a] Mr. Kanstoroom also "found it very common for contractors [like Mr. Hyatt] to agree to perform work for whatever the insurance adjuster writes." This approach by Mr. Hyatt, which mirrored the routine and accepted practice in the industry, formed a central aspect of the government's inferential claim that he acted fraudulently.

This newly discovered evidence found by Mr. Kanstroroom bore directly on both the quality and credibility of the government's case against Mr. Hyatt. It is not merely cumulative of impeachment and other defense efforts.

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Mr. Hyatt presented this newly discovered evidence in a motion to vacate properly filed within one year of his discovery of the evidence found by Mr. Kanstroroom. [App. 14a-67a] The district court dismissed his motion as untimely under 28 U.S.C. § 2255(4) without an evidentiary hearing, essentially concluding that the new evidence was not material to the case. [App. 7a-13a] The Fourth Circuit denied his request for a certificate of appealability in a perfunctory one-paragraph opinion containing no analysis, despite the request presenting issues about which reasonable jurists have disagreed. [App. 2a-3a] Thus, the federal questions were raised and rejected on the merits. They are properly presented to this Court for review.

REASONS WHY A WRIT SHOULD BE GRANTED

I. THE FOURTH CIRCUIT IMPROPERLY DENIED A CERTIFICATE OF APPEALABILITY UNDER *MILLER-EL v. COCKRELL* AND *TENNARD v. DRETKE* WHERE KENNETH HYATT PRESENTED NEWLY DISCOVERED EXPERT EVIDENCE OF GOVERNMENTAL MALFEASANCE, FAULTY INVESTIGATION, AND FALSE TESTIMONY THAT WOULD LIKELY HAVE CAUSED THE JURY TO ACQUIT HIM, RAISING AN IMPORTANT ISSUE OF FEDERAL LAW WORTHY AND CREATING AN INTER-CIRCUIT DISPUTE REGARDING CERTIFICATES OF APPEALABILITY THAT THIS COURT MUST SETTLE.

Kenneth Ray Hyatt sought review in the Fourth Circuit of the district court's denial of his motion to vacate, which was based on compelling and material newly discovered evidence that the district court acknowledged could not have been discovered with due diligence. The Fourth Circuit denied him a certificate of appealability in a one-paragraph, summary "opinion," containing no analysis of the issue. [App. 2a-3a] The Fourth Circuit's perfunctory denial of a certificate of appealability is at odds with the teachings of this Court, *see Tennard v. Dretke*, 542 US. 274, 282 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 481 (2000),

and contrary to the practice in at least the Fifth and Tenth Circuits. *See Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004); *Flournoy v. McKune*, 266 Fed. Appx. 753 (10th Cir. 2008). This Court should review the Fourth Circuit's practice of summarily denying certificates of appealability and resolve the division among the circuits on this matter. In particular, this Court should intervene where the denial of a certificate of appealability forecloses review of a motion to vacate based on compelling new evidence that made it more likely than not that no reasonable juror would have found Mr. Hyatt guilty beyond a reasonable doubt. *See House v.* Bell, 547 U.S. 518, 536 (2006); *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

A. This Court should address the question of whether a petitioner is entitled to meaningful review of his application for a certificate of appealability.

This Court has clearly stated the standard for granting a certificate of appealability. While its issuance is not automatic, a petitioner seeking to appeal from the denial of a petition for wit of habeas corpus "need only demonstrate a 'substantial showing of the denial of a constitutional right.'"

Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).[3] A reviewing court may not deny a certificate of appealability on the grounds that the petitioner will not succeed on the merits. Rather, a certificate of appealability should be granted where the petitioner has "demonstrate[ed] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.*, citing *Slack v. McDaniel*, 529 U.S. 473, 481 (2000). In other words, a "court of appeals should be confident that petitioner's claim is squarely foreclosed by statute, rule or authoritative court decision, or is lacking any factual basis in the record . . . before dismissing it as frivolous." *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983).

The circuits are split as to the degree of analysis given to denials of habeas petitioners' applications for certificates of appealability. The Fifth and Tenth Circuits fully state their reasons for denying COA. *See, e.g., Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), *Flournoy v. McKune*, 266 Fed. Appx. 753 (10th Cir. 2008). The summary opinion

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[3]It is difficult to imagine a more substantial denial of a constitutional right than to have a conviction go unreviewed in the face of "new reliable evidence . . . that was not presented at trial," *Schlup*, 513 U.S. at 324, given "the imperative of correcting a fundamentally unjust conviction." *House*, 547 U.S. at 536 (quoting *Engle v. Isaac*, 546 U.S. 107, 129 (1977)).

from the Fourth Circuit here stands in sharp contrast.[4]

The standards applied by the circuits in denying a certificate of appealability are subject to review by this Court. For example, in *Miller-El*, this Court held that the Fifth Circuit Court of Appeals erred in (1) reaching the merits of the claim before issuing its certificate of appealability, and (2) applying too stringent a standard in reviewing the petitioner's claim. *Miller-El*, 537 U.S. at 341-42. Here, this Court has no opportunity to review the Fourth Circuit's decision as it is impossible to discern why it denied Mr. Hyatt's application for a certificate of appealability. Nothing indicates the Fourth Circuit found his claim "squarely foreclosed" by law or the facts. *Barefoot*, 463 U.S. at 894. As far as the record shows, the Fourth Circuit, as did the Fifth Circuit in *Miller-El*, improperly denied certificate of appealability by finding the claims to be without merit or by imposing a more onerous standard than that required for the threshold

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[4] Similarly, the Second Circuit apparently issues summary orders denying an application for COA. *See Lewis v. McGinnis*, 04-cv-32 (2d Cir., 29 August 2008).

showing for a certificate of appealability.[5] If the Fourth Circuit adopted the district court's reasoning, it improperly engaged in a determination of the merits. *Miller-El*, 537 U.S. at 342. In reviewing an application for certificate of appealability, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.*

Had Mr. Hyatt filed his motion to vacate in the Fifth or Tenth Circuit, he would have received some measure of analysis explaining why the certificate of appealability was denied, as in *Medellin* and *Flournoy*. Instead, the Fourth Circuit's summary denial of certificate of appealability in this manner effectively turns the application for certificate of appealability into a petition for writ of certiorari. While the decision to take review on certiorari is discretionary, the decision to issue a certificate of appealability is not. Although § 2253 states that "certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right," *Miller-El*

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[5]The Fourth Circuit may read *Miller-El* as directing such summary dismissals. Before *Miller-El*, the Fourth Circuit issued written opinions stating the reasons for denying the application. *See Mueller v. Angelone*, 181 F.3d 557 (4th Cir. 1999) (denying COA and dismissing capital habeas appeal in 37-page opinion because issue "squarely foreclosed" by earlier opinion of the court). This practice appears to have been abandoned as a result of Justice Scalia's concurrence in *Miller-El*, wherein he cited specifically to the Fourth Circuit in noting that "some courts have simply allowed merits appeals to be taken *without* a COA-in flat contravention of 28 U.S.C. § 2253(c)(1)(A). *See, e.g. Bates v. Lee*, 308 F.3d 411 (CA4 2002)." *Miller-El*, 537 U.S. at 349, (Scalia, J., concurring). Apparently, further direction from this Court is needed.

makes clear that a petitioner who has made the requisite showing is entitled to the issuance of a certificate of appealability.

B. Mr. Hyatt met the low threshold for a certificate of appealability.

The standard for granting a certificate is low and has been clearly articulated. "A COA should issue if the applicant has 'made a substantial showing of the denial of a constitutional right,' which we have interpreted to require that the 'petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Tennard*, 542 US. at 282 (citations omitted). "A prisoner seeking COA [is not required] to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus.'" *Miller-El*, 537 U.S. at 338 (internal quotations omitted). The circuit must not adjudicate the merits of a claim in deciding whether to issue a COA. It "should not decline the application for a COA merely because it believes the applicant will not demonstrate entitlement to relief." *Id.* at 337. The question is merely whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

Here, the Fourth Circuit essentially ignored the requirements of *Tennard* and *Miller-El*. There is nothing in the record to show the court found the issues foreclosed as a matter of law. Moreover, given the astounding revelations in Mr. Kanstoroom's report [App. 43a-67a], the issues Mr. Hyatt raised

are debatable among jurists of reason and worthy of encouragement to proceed further. He deserved an opportunity to proceed further on the matter he raised in the district court.

He presented compelling, material evidence that he could not have discovered with due diligence. This evidence included information that (1) government witnesses mistakenly and erroneously testified that FEMA and its entities pay only for damages caused by direct water contact; (2) government witnesses mistakenly and erroneously testified that amounts paid to Mr. Hyatt exceeded permissible amounts or were unreasonably high, due to the intentional use of "low-ball" estimates by FEMA; (3) government witnesses inaccurately testified about water contact and pricing guidelines and gave the jury materially incorrect information about Mr. Hyatt; (4) much of the key information against Mr. Hyatt came from people without any training as an adjuster; (5) water contact is not a prerequisite for payment to cover hurricane and flood damage at the time of Mr. Hyatt's work, contrary to the explicit testimony of several government witnesses; (6) the automated software programs used to determine prices for reconstruction and replacement prices used in the industry are not uniform or even consistent, contrary to the explicit testimony of key government witnesses, as there is "a wide variation in prices that amounts to hundreds of percent;" (7) these "programs are often used to low-ball insurance claims," meaning "adjusters' 'approved prices' are often far lower than the fair price necessary to complete the repairs;" (8) these practices are "fraudulent;" and (9) it is "very

common for contractors [like Mr. Hyatt] to agree to perform work for whatever the insurance adjuster writes," meaning the approach used by Mr. Hyatt reflected the routine and accepted practice in the industry, which would categorically refute the government's inferential claim that Mr. Hyatt acted fraudulently. [App. 43a-67a]

Mr. Hyatt's claim that this evidence was material and would have resulted in an acquittal could be debated by reasonable jurists or is more than sufficient to justify encouraging him to proceed further, particularly where the district court ruled on a motion to dismiss, did not require a substantive response from the government, did not conduct an evidentiary hearing, and gave only the most cursory treatment of the newly discovered evidence. *See Raines v. United States,* 423 F.2d 526, 529 (4th Cir. 1970)(evidentiary hearing mandatory on section 2255 motion unless pleadings, files, and records show defendant entitles to no relief); *see also Humphries v. United States,* 2007 WL 1892114 (6th Cir. 2007)(issuing certificate of appealability and remanding for failure consider timing of motion under section 2255); *Hasan v. Galaza,* 254 F.3d 1150, 1154-55 (9th Cir. 2001)(issuing certificate of appealability and remanding for failure to make proper inquiry under section 2255). This Court should grant certiorari.

C. The New Evidence That Would Have Resulted in a Different Verdict.

As Mr. Hyatt explained in his section 2255 motion, Steven J. Kanstoroom, an expert in Pattern Recognition and Fraud Detection, prepared a "Summary of Newly Discovered Evidence in the Case of the United States of America v. Donald Kennelly and Kenneth Ray Hyatt" that he submitted to the Congressional Research Service on 19 November 2005. Mr. Hyatt first learned on this submission when Mr. Kanstoroom contacted him about it after Mr. Kanstoroom submitted the report. Mr. Kanstoroom did not believe he could release this information until he submitted it to the CRS. In summary, this significant report demonstrates the following critical findings germane to the government's case against Mr. Hyatt:

–government witnesses mistakenly and erroneously testified that FEMA and its entities pay only for damages caused by direct water contact;

–government witnesses mistakenly and erroneously testified that amounts paid to Mr. Hyatt exceeded permissible amounts or were unreasonably high, due to the intentional use of "low-ball" estimates by FEMA;

–government witnesses inaccurately testified about water contact and pricing guidelines and gave the jury materially incorrect information about Mr. Hyatt

–much of the key information against Mr. Hyatt came from people without any training as an adjuster;

– water contact is not a prerequisite for payment to cover hurricane and flood damage at the time of Mr. Hyatt's work, contrary to the explicit testimony of several government witnesses;

–the automated software programs used to determine prices for reconstruction and replacement prices used in the industry are not uniform or even consistent, contrary to the explicit testimony of key government witnesses;

–automated software programs "are often used to low-ball insurances claims" and "the adjusters' 'approved prices' are often far lower than the fair price necessary to complete the repairs.

Perhaps most important, Mr. Kanstoroom believed these practices are "fraudulent." [App. 30a-31a, 36a] He "found it very common for contractors [like Mr. Hyatt] to agree to perform work for whatever the insurance adjuster writes." This approach by Mr. Hyatt, which mirrored the routine and accepted practice in the industry, formed a central aspect of the government's inferential claim that he acted fraudulently. Mr. Kanstroroom's investigation demonstrably reveals the government's case was at best faulty and misleading and at worst false and fraudulent. Justice Kennedy recently observed for the Court "the imperative of correcting a fundamentally unjust conviction." *House*, 547 U.S.

at 536 (quoting *Engle v. Isaac*, 546 U.S. at 129). This case presents that "imperative."

Contrary to the rather summary analysis by the district court, which characterized the proffered new evidence as "vague," this newly discovered evidence bears directly on both the quality and legitimacy of the government's case against Mr. Hyatt. The district court engaged in little or no evaluation of this report other than this conclusive observation. [App. 8a-10a] The government has never responded to, disputed, or analyzed any particular aspect of this new information. The district court itself never discussed any of this specific information in this newly discovered evidence in the context of the trial evidence, which it had itself described as merely a "paucity" and virtually non-existent. *See Schlup*, 513 U.S. at 327 (new evidence compels relief if it makes it "more likely than not that no reasonable juror would have found [Mr. Hyatt] guilty beyond a reasonably doubt" if the evidence had been presented at trial).

The district court's omission of its own observations about the "paucity" quality and quantity of the evidence against Mr. Hyatt, as opposed to his co-defendant, is curious and reflects a failure to follow the teachings in *House v. Bell* and *Schlup v. Delo*. During the testimony of the FEMA agent who worked with the Inspector General for FEMA, the district court expressed its concerns with the government's proof of a conspiracy. Moreover, at the close of the government's case, the district court twice noted the "paucity of the evidence" of a connection between the defendants. At the close of

all the evidence, the district court again noted the "paucity of the evidence" and described the case as a "very, very close call." No direct evidence showed an illicit agreement between Mr. Hyatt and Mr. Kennelly. No evidence showed they knew each other before arriving at the scene of the hurricane. No evidence showed they ever met and discussed an illegal alliance after arriving in Kure Beach. No evidence showed Mr. Kennelly contrived to arrange for Mr. Hyatt's company to obtain the contract to make the repairs. No evidence showed Mr. Hyatt paid any bribe or kickback to Mr. Kennelly to get him to falsify his loss estimates. No evidence showed Mr. Hyatt ever engaged in intentional wrongdoing during his long, unblemished career. Against this backdrop, the new evidence is sufficiently substantial to require relief.

Mr. Hyatt's conviction rested on purely circumstantial evidence, another point wholly ignored by the district court yet critical to the materiality calculus. The newly discovered evidence from Mr. Kanstoroom's investigation, as described in his report, would have caused a different result at Mr. Hyatt's trial. Thus, it meets the test for "facts supporting the claim" under section 2255(4), contrary to the district court's conclusion and the Fourth Circuit's implicit agreement.

These new facts cast substantial doubt on the veracity of the government's case, not the mere credibility of its witnesses, particularly the process used by FEMA and its related entities to assess and pay for reconstruction after damage causes by hurricanes and floods. *See House*, 547 U.S. at 537 ("new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial") (citation omitted). These new facts show, in Mr. Kanstoroom's expert opinion, a substantial possibility that Mr. Hyatt was convicted based on materially misleading if not false testimony.

D. Mr. Hyatt Could Not Reasonably Have Discovered This Evidence at an Earlier Time.

This newly discovered evidence involved the result of an investigation by and report of Mr. Kanstoroom who conducted a comprehensive and exhaustive, two-year investigation into FEMA and many of its related entities to the Congressional Research Service. He felt this information could not have been obtained by Mr. Hyatt through the

exercise of reasonable diligence.[6] He himself did not believe he could divulge this material, much of which was secretive and obtained through "whistleblower" protection, to anyone until he presented it to the CRS on November 19.

Indeed, Mr. Hyatt could hardly have discovered them. These new facts were developed only through a comprehensive and thorough investigation of a government agency by a highly experienced and qualified expert in the detection of fraud. It required obtaining and reviewing "whistleblower" documents that would not be ordinarily available to a lay person.

Mr. Hyatt could not reasonably have obtained the facts supporting this motion until receiving Mr. Kanstoroom's report when it was disseminated to the CRS on 19 November 2005. *Moore v. Knight*, 368

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[6]Although the district court stated it assumed Mr. Hyatt could not have discovered this evidence and used "due diligence" [App. 12a], it suggested, but did not explain how or why, Mr. Hyatt's motion under section 2255 was not timely. [App. 12a] It did not cite a single case dealing with the applicable portion of section 2255(4). Section 2255(4) does not require the movant to exercise "the maximum feasible diligence, only 'due,' or reasonable diligence." *Locasico v. United States*, 395 F.3d 51, 55-56 (2d Cir. 2005). As *Locasico* points out, section 2255(4) is only triggered when the movant discovers the new facts. Mr. Hyatt could not have reasonably discovered these facts while incarcerated. *Avon v. United States*, 291 F.3d 708, 712 (11th Cir. 2002). Due diligence only requires reasonable efforts under the circumstances, not "the maximum feasible diligence." *Wims v. United States*, 225 F.3d 186, 190 n.4 (2d Cir. 2000); *accord Easterwood v. Champion*, 213 F.3d 1321, 1323-24 (10th Cir. 2000). The district court's ruling and the Fourth Circuit's tacit acceptance of it is at odds with the notions of due diligence in Second, Tenth, and Eleventh Circuits.

F.3d 936, 939 (7th Cir. 2004) (finding movant did not have requisite information to proceed under this section until receiving letter that contained necessary information to raise his claim). At that point, Mr. Hyatt had one year to file his motion to vacate. *DiCenzi v. Rose*, 452 F.3d 465, 470 (6th Cir. 2006). He timely acted with that one-year period. The Fourth Circuit's acceptance of the district court's denial of the motion on grounds that it was untimely is at odds with the Sixth and Seventh Circuits. At the very least, jurists of reason could debate the timeliness of the motion based on the newly discovered evidence not being material to the case

E. The Lower Court Erred in its Evaluation of the New Evidence.

The newly discovered evidence found by Mr. Kanstroroom bears directly on both the quality and credibility of the government's case against Mr. Hyatt. As such, it is the "new reliable evidence" that would have made it "more likely than not that no reasonable juror would have found [Mr. Hyatt guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 324, 327. It is not "merely cumulative of [the] impeachment and defense efforts at trial," as the district court summarily characterized it. [App. 11a] A brief review of the government's evidence demonstrates its critical significance and shows why the district court erred in denying Mr. Hyatt's motion to set aside the judgment against him.

The case rested on a theory that Mr. Hyatt and Donald Kennelly conspired to defraud FEMA by obtaining money to which they were not entitled in

connection with the reconstruction project at Ocean Dunes. In essence, the government claimed (1) Mr. Kennelly caused a competitor of the repair company to submit an unsuccessful bid for the Ocean Dunes project; (2) Mr. Kennelly caused Ocean Dunes to enter into a contract with the repair contractor; (3) Mr. Kennelly delivered insurance proofs of loss to Ocean Dunes knowing they would be submitted to NFIP for payment; (4) Mr. Kennelly delivered Ocean Dunes proofs of loss as claims for payment to INS; (5) Mr. Kennelly and Mr. Hyatt agreed to make repairs to numerous non-NFIP covered items which would be paid for from proceeds of the conspiracy; (6) Mr. Kennelly and Mr. Hyatt caused checks to be mailed that were payable to Mr. Hyatt and Coastal; and (7) Mr. Kennelly and Mr. Hyatt received proceeds from the allegedly fraudulent insurance filings.

At trial, the government also introduced evidence relating to the scope of flood insurance and the price of labor and material. The government claimed some of Mr. Kennelly's proofs of loss were improperly inflated through the use of unrealistically high prices for certain items included within them and that he submitted proofs of loss for items not actually covered by the insurance policies.

The government offered opinion evidence that flood insurance covers only that which is within the footprint of the insured building and the scope of flood insurance and the price of labor and materials covered by flood insurance is only the direct loss caused by flood waters. In preparation to testify about the prices of various repair items, at least one

witness reviewed Ocean Dunes files from the government but did not review the NFIP material or research the prices available in the aftermath of the hurricane. Rather, he simply remembered the prices he used when he worked as an adjuster after Hurricane Fran, six years before the trial.

In essence, the government claimed Mr. Hyatt, a contractor, conspired with Mr. Kennelly, an independent insurance adjuster, to defraud FEMA by obtaining money to which they were not entitled from funds paid by FEMA to repair hurricane damage to Ocean Dunes. However, no direct evidence showed an illicit agreement between Mr. Hyatt and Mr. Kennelly. No evidence showed they knew each other before arriving at the scene of the hurricane. No evidence showed they ever met and discussed an illegal alliance after arriving in Kure Beach. No evidence showed Mr. Kennelly contrived to arrange for Mr. Hyatt's company to obtain the contract to make the repairs. No evidence showed Mr. Hyatt paid any bribe or kickback to Mr. Kennelly to get him to falsify his loss estimates. No evidence showed Mr. Hyatt ever engaged in intentional wrongdoing during his long, unblemished career.

Mr. Hyatt's conviction rested on purely circumstantial evidence, which the district court recognized was essentially non-existent at trial. The newly discovered evidence submitted herein would have caused a different result at Mr. Hyatt's trial. These circumstances included: that Mr. Kennelly's loss estimates were too high, because he had improperly inflated the costs of some repairs and

included repairs which were not covered by the condominium's insurance policy; that Mr. Hyatt agreed to make all repairs covered by insurance, as well as certain other uncovered repairs and improvements, which is a typical and routine practice in this business; and that some of the repairs included in the loss estimates prepared by Mr. Kennelly were not done in the course of the actual reconstruction.

However, the evidence showed Mr. Kennelly came to the area from his home in New Orleans, Louisiana; Mr. Hyatt came to the area from his home in Texas. Not one of the many witnesses who were at Ocean Dunes during the post-Fran damage assessment and repair process saw or heard Mr. Kennelly and Mr. Hyatt have a conversation.

Mr. Hyatt intended to make money from the Ocean Dunes project. His company was to be paid the entire amount of flood and wind insurance proceeds for its efforts. He worked independently of Mr. Kennelly toward his goal. Mr. Hyatt would profit only if his company could complete the work he agreed to do for less than the amount of the insurance proceeds. Such uncertainty, otherwise known as risk, is not in any way unusual. This willing assumption of risk is common and completely legitimate. It does not even suggest criminal wrongdoing.

Mr. Kanstoroom's report contained findings material to Mr. Hyatt's defense of the charges, including (1) government witnesses mistakenly and erroneously testified that FEMA and its entities pay

only for damages caused by direct water contact; (2) government witnesses mistakenly and erroneously testified that amounts paid to Mr. Hyatt exceeded permissible amounts or were unreasonably high, due to the intentional use of "low-ball" estimates by FEMA; (3) government witnesses inaccurately testified about water contact and pricing guidelines and gave the jury materially incorrect information about Mr. Hyatt; (4) much of the key information against Mr. Hyatt came from people without any training as an adjuster; (5) water contact is not a prerequisite for payment to cover hurricane and flood damage at the time of Mr. Hyatt's work, contrary to the explicit testimony of several government witnesses; (6) the automated software programs used to determine prices for reconstruction and replacement prices used in the industry are not uniform or even consistent, contrary to the explicit testimony of key government witnesses. Rather, there is "a wide variation in prices that amounts to hundreds of percent." [App. 43a-67a] Mr. Kanstoroom found "such programs are often used to low-ball insurances claims" and provides the rationale for these tactics. As a result, "the adjusters' 'approved prices' are often far lower than the fair price necessary to complete the repairs." These practices are "fraudulent." [App. 36a] Mr. Kanstoroom "found it very common for contractors [like Mr. Hyatt] to agree to perform work for whatever the insurance adjuster writes." This approach by Mr. Hyatt, which mirrors the routine and accepted practice in the industry, formed a central aspect of the government's inferential claim that he acted fraudulently.

This newly discovered evidence casts substantial doubt on the veracity of the government's case and the process used by FEMA and its related entities to assess and pay for reconstruction and rebuilding after damage causes by hurricanes and floods. It presents "the imperative of correcting a fundamentally unjust conviction." *House*, 547 U.S. at 536. There exists a substantial possibility Mr. Hyatt was convicted based on materially misleading if not false testimony. *Schlup*, 513 U.S. at 327. Given the district court's own recognition of the "paucity" of evidence against Mr. Hyatt and characterization of the case itself as a "very, very close call," its rather cursory dismissal of this new evidence, without even a summary discussion of its content, strongly suggests the error in dismissing this action. The presentation of the information recently discovered by Mr. Kanstoroom might well have led a jury to render a different verdict. Under these circumstances, the Fourth Circuit erred in denying a certificate of appealability. This Court should grant a writ of certiorari.

CONCLUSION

For the reasons stated herein, Kenneth Ray Hyatt respectfully requests that the matter be summarily reversed with directions to issue a certificate of appealability or that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit.

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Counsel for Petitioner

[ENTERED: OCTOBER 2, 2009]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-8455

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KENNETH R. HYATT,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, Senior District Judge. (7:02-cr-00013-F-2; 7:06-cv-00173-F)

Submitted: August 10, 2009

Decided: October 2, 2009

Before NIEMEYER, MICHAEL, and SHEDD, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Milton Gordon Widenhouse, Jr., RUDOLF, WIDENHOUSE & FIALKO, Chapel Hill, North Carolina, for Appellant. Rudolf A. Renfer, Jr., Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kenneth R. Hyatt seeks to appeal the district court's order dismissing as untimely his 28 U.S.C.A. § 2255 (West Supp. 2009) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006); Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). For claims dismissed on procedural grounds, this standard is satisfied by showing both that jurists of reason would find it debatable whether the motion states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S.

473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Hyatt has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

[ENTERED: OCTOBER 2, 2009]

FILED: October 2, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-8455
(7:02-cr-00013-F-2)
(7:06-cv-00173-F)

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

KENNETH R. HYATT,

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this Court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED: AUGUST 18, 2008]

United States District Court
Eastern District of North Carolina

KENNETH R. HYATT
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

Judgment in a 2255 Case

Criminal Case No. 7:02-CR-13-02-F
Civil Case Number: 7:06-CV-173-F

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that respondent's motion to dismiss is granted and this action is hereby dismissed.

THE ABOVE JUDGMENT WAS FILED AND ENTERED TODAY, AUGUST 18, 2008 AND COPIES SENT TO:

Via U.S. Postal Service

Via Notice of Electronic Filing
M. Gordon Widenhouse, Jr.
Rudolf, Widenhouse & Fialko

Steve R. Matheny
U.S. Attorney's Office

August 18, 2008 /s/ Dennis P. Iavarone
Date Clerk of Court

Raleigh, North Carolina

[ENTERED: AUGUST 18, 2008]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:02-CR-13-02-F1
No. 7:06-CV-173-F

KENNETH RAY HYATT, Petitioner,	)	
v.	)	ORDER
UNITED STATES OF AMERICA Respondent.	)	

Kenneth Ray Hyatt ("Hyatt") was convicted in November 2002 of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, and mail fraud and aiding and abetting, in violation of 18 U.S.C. §§ 1341 and 2. Hyatt unsuccessfully appealed his conviction and sentence, which were affirmed by the Fourth Circuit Court of Appeals. *See United States v. Kennelly*, 84 Fed. Appx. 278 (4th Cir. 2003), *cert. denied*, 541 U.S. 1018 (2004). Hyatt filed the instant § 2255 motion [DE-142] on November 20, 2006.

The case now is before the court on the Government's Motion to Dismiss [DE-146] Hyatt's § 2255 motion [DE-142]. The sole ground for the Government's motion is the assertion that, because the § 2255 action was not filed within the one-year

statute of limitations period,[1] this court lacks subject matter jurisdiction. Hyatt relies, however, on paragraph 4 of § 2255, which provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-
>
> * * * *
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 ¶ 4 (2006).

Hyatt's purported "newly discovered evidence," is a document entitled, "Summary of Newly Discovered Evidence in the Case of the United States of America v. Donald Kennelly and Kenneth Ray Hyatt," (hereinafter "Summary"), and related investigative materials assembled and prepared by Steven J. Kanstoroom, and dated November 19, 2005. The "newly discovered evidence" upon which Hyatt bases his motion, both jurisdictionally and substantively,

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[1] The Government calculates the one-year limitations period as commencing on or about the date on which the Supreme Court denied Hyatt's petition for writ of certiorari, and contends the filing deadline expired on April 26, 2005.

> involves the result of an investigation by and report of Steven J. Kanstoroom. ... [whose] expert opinion ... 'demonstrates systemic problems within FEMA,' including the intentional use of 'low-ball' adjustments and the perpetration of 'materially false and misleading information' that formed the basis for operations, audits, and prosecutions, including' that key governments [sic] witnesses came to provide the false and misleading testimony' in Mr. Hyatt's trial. It is also Mr. Kanstoroom's expert opinion cold [sic] not have been obtained by Mr. Hyatt through the exercise of reasonable diligence and contributed to his 'wrongful conviction' in this court."

Hyatt's § 2255 Motion [DE-142] at p. 1.

Hyatt's own list of Kanstoroom's "material findings germane to" this motion is found at pages 3-4 of Hyatt's Response to the Government's Motion to Dismiss [DE-148]. The list is composed of assertions that are cumulative of testimony produced on cross-examination of the Government's witnesses at trial and/or impeachment-type evidence produced by the defense.

Kanstoroom's opinion of the *Hyatt* and *Kennelly* case includes his conclusion that:

> [c]entral to the FEMA [Inspector General's] Ocean Dunes investigation, and the subsequent indictments, were two misstatements of fact. First, the government witnesses mistakenly testified that the NFIP only pays for damages caused by direct water contact. [S]econd; [sic] government witnesses testified that amounts paid for certain line items exceeded amounts they believed were permitted to be paid under the NFIP or were otherwise unreasonably high.

Summary, p. 3. Hyatt contends the fact of Kanstoroom's investigation and the results thereof came as a complete surprise to him when Kanstoroom contacted him on November 20, 2005, one day after Kanstoroom purportedly had presented

the Summary to the Congressional Research Service.[2] Hyatt filed this motion one year thereafter.

According to the Fourth Circuit Court of Appeals, a paragraph 4 § 2255 motion is timely only if (1) the evidence was newly discovered; (2) the movant exercised due diligence in discovering the evidence; (3) the evidence was not merely cumulative or impeaching; (4) the evidence was material to the issues; and (5) the evidence would probably result in an acquittal at a new trial. *See United States v. Chavis*, 880 F.2d 788, 793 (4th Cir. 1989). The Government contends that Hyatt cannot meet this test, and the court, therefore, lacks subject matter jurisdiction.

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[2] "The ... Library of Congress, is a congressional agency. *See* 2 U.S.C. § 171(1) (1982). The Library is divided into departments, and the Congressional Research Service is one of these departments. 2 U.S.C. § 166(a). CRS' mandate is to "advise and assist" congressional committees in the analysis, appraisal, and evaluation of legislative proposals and recommendations submitted by the executive branch. The CRS is charged with performing these duties "without partisan bias." 2 U.S.C. § 166(d)(1). In practice, the Service's work brings it into contact with Congress in many different ways."

The Service makes [its] research available, without partisan bias, in many forms including studies, reports, compilations, digests, and background briefings. Upon request, CRS assists committees in analyzing legislative proposals and issues, and in assessing the possible effects of these proposals and their alternatives. The Service's senior specialists and subject analysts are also available for personal consultations in their respective fields of expertise.

Keeffe v. Library of Congress, 777 F.2d 1573, 1574-75 (D.C. Cir. 1985).

Assuming without deciding that neither Hyatt nor his counsel reasonably could have discovered Kanstoroom's Summary and related materials prior to November 19, 2005, using "due diligence," Hyatt nevertheless has failed to explain: (a) in what way Kanstoroom's Summary is material to demonstrating a constitutional violation attributable to the Government resulting in Hyatt's conviction, (b) why Kanstoroom's materials are not merely cumulative of Hyatt's impeachment and defense efforts at trial, or (c) in what way he believes Kanstoroom's investigation and conclusions probably would result in his acquittal at a new trial. Although Kanstoroom may have made an interesting defense witness at trial had he and his research then been available, Hyatt's vague proffer of Kanstoroom's materials is insufficient to satisfy the requirements for filing a § 2255 motion pursuant to paragraph 4.[3]

Because Hyatt has failed to demonstrate that he is entitled to file this § 2255 motion later than April 26, 2005, the court finds that it is barred by the one-year statute of limitations. Accordingly, the Government's Motion to Dismiss [DE-146] for lack of subject matter jurisdiction is ALLOWED, and this action is DISMISSED.

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[3] Presumably, the gravamen of Hyatt's allegations is that he is "in custody" in violation of the Fifth Amendment of the United States Constitution guaranteeing due process. He did not identify the Constitutional right upon which he bases his motion.

SO ORDERED.

This the 18th day of August, 2008.

/s/
JAMES C. FOX
Senior United States District Judge

[ENTERED: NOVEMBER 20, 2006]

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court

District Eastern District of North Carolina

Name of Movant Kenneth Ray Hyatt

Prisoner No. 21428-056

Case No. 7:02-CR-013-002

Place of Confinement FPC Beaumont, Beaumont, TX and Surpervised Release

UNITED STATES OF AMERICA V. Kenneth Ray Hyatt
(name under which convicted)

MOTION

1. Name and location of court which entered the judgment of conviction under attack
United States District Court for the Eastern District of North Carolina -- Southern Division

2. Date of judgment of conviction
3/17/2003

3. Length of sentence
27 months active with 36 months of supervised release

4. Nature of offense involved (all counts)
Count 1: Conspiracy to defraud the United States under 18 U.S.C. 371
Count 2: Mail fraud under 18 U.S.C.1341
Count 3: Mail fraud under 18 U.S.C. 1341

5. What was your plea? (Check one)
(a) Not guilty [X]
(b) Guilty [ ]
(c) Nolo contendere [ ]

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
(a) Jury [X]
(b) Judge only [ ]

7. Did you testify at the trial?
Yes [ ] No [X]

8. Did you appeal from the judgment of conviction?
Yes [X] No [ ]

9. If you did appeal, answer the following:
(a) Name of court United States Court of Appeals for the Fourth Circuit

(b) Result Affirmed
(c) Date of result 22 November 2003
(certiorari denied on 24 April 2004)

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any federal court?
Yes [ ] No [X]

11. If your answer to 10 was "yes," give the following information:
(a) (1) Name of court
(2) Nature of proceeding
(3) Grounds raised
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [ ] No [ ]
(5) Result
(6) Date of result
(b) As to any second petition, application or motion give the same information:
(1) Name of court
(2) Name of proceeding
(3) Grounds raised
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [ ] No [ ]
(5) Result
(6) Date of result
(c) Did you appeal, to an appellate federal court having jurisdiction, the result of

action taken on any petition, application or motion?

(1) First petition, etc.

Yes [ ] No [ ]

(2) Second petition, etc.

Yes [ ] No [ ]

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective: assistance of counsel.

(j) Denial of right of appeal

A. Ground one:
Newly discovered evidence, not previously available to petitioner, exists that shows false and misleading information was used to secure the indictment against and conviction of petitioner, which, if presented to the jury, would have led to the acquittal of petitioner.
Supporting FACTS (state *briefly* without citing cases or law):
See attached sheets.

B. Ground two:
Supporting FACTS (state *briefly* without citing cases or law):

C. Ground three:
Supporting FACTS (state *briefly* without citing cases or law):

D. Ground four:
Supporting FACTS (state *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes [ ] No [X]

15. Give the name and address, if known, of each attorney who represented you in the following stages or the judgment attacked herein:

(a) At preliminary hearing
(b) At arraignment and plea
Sue Genrich Berry
Post Office Box 2693
Wilmington, NC 28402-2693
(c) At trial
Sue Genrich Berry
Post Office Box 2693
Wilmington, NC 28402-2693
(d) At sentencing
Sue Genrich Berry
Post Office Box 2693
Wilmington, NC 28402-2693
(e) On appeal
Sue Genrich Berry
Post Office Box 2693
Wilmington, NC 28402-2693
(f) In any post-conviction proceeding
(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes [X] No [ ]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes [ ] No [X]
(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes [ ] No [ ]

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

/s/_____
Signature of Attorney (if any)
M. Gordon Widenhouse, Jr.

I declare under penalty of perjury that the foregoing is true and correct. Executed on

_____
Date

_____
Signature of Movant

Supporting Facts for Ground One

The newly discovered evidence involves the result of an investigation by and report of Steven J. Kanstoroom. In a letter dated 19 November 2005 to Rawle King, Insurance Analyst with Congressional Research Service, Mr. Kanstoroom describes a two-year investigation he conducted into the Federal Emergency Management Agency (FEMA) and many of its related entities. [A copy of this letter is attached.] Mr. Kanstoroom is an expert in Pattern Recognition and Fraud Detection. [A copy of his Statement of Qualifications is attached.] As part of his investigation, Mr. Kanstoroom received "whistleblower" and "smoking gun" documents. In his expert opinion, Mr. Kanstoroom believes this information "demonstrates systemic problems within FEMA," including the intentional use of "low-ball" adjustments and the perpetration of "materially false and misleading information" that formed the basis for operations, audits, and prosecutions, including "that key government witnesses came to provide the false and misleading testimony" in Mr. Hyatt's trial. It is also Mr. Kanstoroom's expert opinion cold not have been obtained by Mr. Hyatt through the exercise of reasonable diligence and contributed to his "wrongful conviction" in this Court.

Mr. Kanstoroom prepared a "Summary of Newly Discovered Evidence in the Case of the United States of America v. Donald Kennelly and Kenneth Ray Hyatt," dated 19 November 2005, which he submitted to the Congressional Research Service. [A copy of this document is attached.]

Without unduly repeating the information contained in this significant report, it contains the following findings that are material to this motion to vacate: (1) government witnesses mistakenly and erroneously testified that FEMA and its entities pay only for damages caused by direct water contact; (2) government witnesses mistakenly and erroneously testified that amounts paid to Mr. Hyatt exceeded permissible amounts or were unreasonably high, due to the intentional use of "low-ball" estimates by FEMA. [Kanstoroom Report at 3] The government witnesses inaccurately testified about water contact and pricing guidelines and gave the jury materially incorrect information about Mr. Hyatt. [Kanstoroom Report at 6] Many of the key information against Mr. Hyatt came from people without any training as an adjuster. [Kanstoroom Report at 6] Contrary to the explicit testimony of several government witnesses, water contact is not a prerequisite for payment to cover hurricane and flood damage at the time of Mr. Hyatt's work. [Kanstoroom Report at 7-8] Also contrary to the explicit testimony of key government witnesses, the automated software programs used to determine prices for reconstruction and replacement prices used in the industry are not uniform or even consistent. Rather, there is "a wide variation in prices that amounts to hundreds of percent." Mr. Kanstoroom found "such programs are often used to low-ball insurances claims" and provides the rationale for these tactics. As a result, "the adjusters' 'approved prices' are often far lower than the fair price necessary to complete the repairs." [Kanstoroom Report at 9] These practices are "fraudulent," [Kanstoroom Report at 12] Mr. Kanstoroom also "found it very common for

contractors [like Mr. Hyatt] to agree to perform work for whatever the insurance adjuster writes." [Kanstoroom Report at 12] This approach by Mr. Hyatt, which mirrors the routine and accepted practice in the industry, formed a central aspect of the government's inferential claim that he acted fraudulently.

This newly discovered evidence found by Mr. Kanstroroom bears directly on both the quality and credibility of the government's case against Mr. Hyatt. A brief review of the government's evidence demonstrates its critical significance and shows why Mr. Hyatt is entitled to have the judgment against him set aside.

A superceding indictment charged Kenneth Ray Hyatt and Donald Kennelly with conspiracy and mail fraud. They allegedly conspired to defraud FEMA by obtaining money to which they were not entitled in connection with a reconstruction project at Ocean Dunes, a residential condominium complex in Kure Beach, North Carolina. In essence, the government claimed (1) Mr. Kennelly caused a competitor of the repair company to submit an unsuccessful bid for the Ocean Dunes project; (2) Mr. Kennelly caused Ocean Dunes to enter into a contract with the repair contractor: (3) Mr. Kennelly delivered insurance proofs of loss to Ocean Dunes knowing they would be submitted to NFIP for payment; (4) Mr. Kennelly delivered Ocean Dunes proofs of loss as claims for payment to INS; (5) Mr. Kennelly and Mr. Hyatt agreed to make repairs to numerous non-NFIP covered items which would be paid for from proceeds of the conspiracy; (6) Mr.

Kennelly and Mr. Hyatt caused checks to be mailed that were payable to Mr. Hyatt and Coastal; and (7) Mr. Kennelly and Mr. Hyatt received proceeds from the allegedly fraudulent insurance filings.

At trial, the government also introduced evidence relating to the scope of flood insurance and the price of labor and material. The government claimed some of Mr. Kennelly's proofs of loss were improperly inflated through the use of unrealistically high prices for certain items included within them and that he submitted proofs of loss for items not actually covered by the insurance policies.

David Odegard, an insurance examiner for FEMA, testified that flood insurance covers only that which is within the footprint of the insured building. Thomas Vaughan testified about the scope of flood insurance and the price of labor and materials and that flood insurance covers only direct loss caused by flood waters. But his testimony was admitted only against Mr. Kennelly. In preparation to testify about the prices of various repair items, Vaughan reviewed Ocean Dunes files received from the government but did not review the NFIP material or research the prices available in the aftermath of Fran. Rather, he simply remembered the prices he used when he worked as an adjuster after Fran, six years before the trial.

Ty Mueller, an agent with the Inspector General for FEMA, testified about his involvement with the investigation of this matter. During Mueller's testimony, this Court expressed its concerns with the government's proof of a

conspiracy. At the close of the government's case, this Court twice noted the "paucity of the evidence" of a connection between the defendants. At the close of all the evidence, this Court again noted the "paucity of the evidence" and described the case as a "very, very close call." Nevertheless, the jury convicted Mr. Kennelly and Mr. Hyatt on all counts. The convictions were affirmed. *United States* v. *Kennelly*, 84 Fed. Appx. 278 (4th Cir., 22 November 2003) (unpublished), *cert. denied*, 541 U.S. 1018 (2004).

In essence, the government claimed Mr. Hyatt, a contractor, conspired with Mr. Kennelly, an independent insurance adjuster, to defraud FEMA by obtaining money to which they were not entitled from funds paid by FEMA to repair hurricane damage to Ocean Dunes. However, no direct evidence showed an illicit agreement between Mr. Hyatt and Mr. Kennelly. No evidence showed they knew each other before arriving at the scene of the hurricane. No evidence showed they ever met and discussed an illegal alliance after arriving in Kure Beach. No evidence showed Mr. Kennelly contrived to arrange for Mr. Hyatt's company to obtain the contract to make the repairs. No evidence showed Mr. Hyatt paid any bribe or kickback to Mr. Kennelly to get him to falsify his loss estimates. No evidence showed Mr. Hyatt ever engaged in intentional wrongdoing during his long, unblemished career.

Mr. Hyatt's conviction rested on purely circumstantial evidence, which this Court recognized was essentially non-existent.

The newly discovered evidence submitted herein would have caused a different result at Mr. Hyatt's trial. These circumstances included: that Mr. Kennelly's loss estimates were too high, because he had improperly inflated the costs of some repairs and included repairs which were not covered by the condominium's insurance policy; that Mr. Hyatt agreed to make all repairs covered by insurance, as well as certain other uncovered repairs and improvements, which is a typical and routine practice in this business; and that some of the repairs included in the loss estimates prepared by Mr. Kennelly were not done in the course of the actual reconstruction.

However, the evidence showed Mr. Kennelly came to the area from his home in New Orleans, Louisiana; Mr. Hyatt came to the area from his home in Texas. Not one of the many witnesses who were at Ocean Dunes during the post-Fran damage assessment and repair process saw or heard Mr. Kennelly and Mr. Hyatt have a conversation.

Mr. Hyatt intended to make money from the Ocean Dunes project. His company was to be paid the entire amount of flood and wind insurance proceeds for its effort. He worked independently of Mr. Kennelly toward his goal. Mr. Hyatt would profit only if his company could complete the work he agreed to do for less than the amount of the insurance proceeds. Such uncertainty, otherwise known as risk, is not in any way unusual. This willing assumption of risk is common and completely legitimate. It does not even suggest criminal wrongdoing.

This newly discovered evidence casts substantial doubt on the veracity of the government's case and the process used by FEMA and its related entities to assess and pay for reconstruction and rebuilding after damage causes by hurricanes and floods. There exists a substantial possibility Mr. Hyatt was convicted based on materially misleading if not false testimony. As this Court recognized, there was a "paucity" of evidence against Mr. Hyatt and the case itself was "very, very close call." The presentation of the information recently discovered by Mr. Kanstoroom might well have led a jury to render a different verdict. Under these circumstances, this Court should vacate the judgment under 28 U.S.C. § 2255.

November 19, 2005

Mr. Rawle King
Insurance Analyst
Congressional Research Service
Library of Congress
101 Independence Avenue SE, RM 303
Washington, DC 20540

Dear Mr. King:

I am writing in response to your written request for information I received yesterday regarding my investigation of the Federal Emergency Management Agency (FEMA) and related entities. Likewise, I enjoyed meeting you earlier this week as well.

I understand that you arc particularly interested in aspects of my investigation that Congresswoman Jo Ann Davis shared with Secretary Chertoff in the letter she faxed to him on November 8, 2005.

I obtained my information from a two-year investigation into FEMA, its National Flood Insurance Program (NFIP) contractor, many of its business partners including third-party processors and third-party claims adjusting firms. My statement of qualifications regarding my investigation is attached[i].

As you know I have provided aspects of my investigation to Congressional members beginning in November 2003, and continuing to date. I have also provided aspects of my investigation to the FEMA Under Secretary, Michaell Brown, Federal

Insurance Administrator Anthony S. Lowe, FEMA Deputy Director Trey Reid and the Maryland Insurance Commissioner.

The Maryland Insurance Commissioner has provided information regarding my investigation to Congress and to thirteen State Insurance Commissioners[ii]. The letter contained several attachments and included in the attached summary.

I have received whistleblower documents from FEMA's Office of General Counsel, FEMA, Computer Sciences Corporation (CSC), NFIP third-party adjusters and adjusting firms. I have also received smoking gun documents from adjusters and others in the insurance industry including a pricing-data vendor relied upon by the industry itself.

The information I have uncovered demonstrates systemic problems within FEMA, its map modernization program, the NFIP and other related entities. In many cases I also have detailed examples of the collateral problems that have resulted.

For example, I have firsthand knowledge and documents that show more than two years before the low-ball adjusting issues surfaced after Hurricane Isabel, the United States Attorney relied upon materially false and misleading information regarding the NFIP, its insurance coverage, insurance claims' pricing determinations and NFIP program operations, including audits. I also have information that may explain how it is that key government witnesses came to provide the false and misleading testimony to the United States

Attorney's Office and the Court in the case of United States of America v. Donald Kennelly and Kenneth Ray Hyatt. I believe the evidence I gathered in connection with the case, and which is briefly summarized on the attachment[iii] could not have been found using reasonable diligence by the parties and could perhaps be viewed as newly discovered evidence.

I believe the false and misleading information lead to the indictments and subsequent wrongful conviction of Messrs. Kennelly and Hyatt for work involving a North Carolina flood claim. In fact, FEMA has refused Congress' repeated requests for some of the very materials at issue.

Information obtained with regard to the above referenced case has a direct relationship to ongoing fraudulent low-ball adjuster practices and fraudulent adjuster certifications that have impacted, and continue to impact, victims in the Gulf Coast states following recent hurricanes Katrina, Rita and Wilma. My most recent Congressional testimony provides an overview of these issues and several links to other documents.

I have very sensitive materials regarding related matters, and which are not described in the attached summary. As you know I feel constrained by the Department of Homeland Security (DHS) Office of the Inspector General's (OIG) position that it is unlawful for me to share materials that implicate DHS OIG's or FEMA 's employees in wrongdoing. Nevertheless, I very much wish to assist you and the Library of Congress. I would be willing to meet with

you or anyone you believe could help resolve the DHS OIG prohibition on releasing whistleblower materials.

I appreciate your desire to learn of my investigation. These materials are only intended to serve as an example of the breadth and scope of what I have found. Please let me know how I can most efficiently and effectively assist you.

Sincerely.

/s/
Steven J. Kanstoroom
sjk@FEMAINFO.US
Cell 301 503-6078

Attachments: [i] Attachment A - Statement of Qualifications - see attached PDF.

[ii] Attachment B Letter sent from MD Insurance Commissioner Redmer to Mississippi Commissioner Dale. Similar letters were sent by Commissioner Redmer to Commissioners from AL, DE, FL, GA, LA, MS, NC, OH, PA, SC, TX, VA and WA. Related attachments are included with the attachments to the Summary of Newly Discovered Evidence

[iii] Attachment C - Summary of Newly Discovered Evidence - United States of America v. Donald Kennelly and Kenneth Ray Hyatt - see attached PDF.

SJK Statement of Qualifications:
Attachment to Cover Letter from S. Kanstoroom to R. King
Re: CRS, Library of Congress Request for Information

I. STATEMENT OF QUALIFICATIONS

I am a pattern recognition and fraud detection expert with twenty-two years experience designing, writing and running expert systems initially for the United States Department of Justice and beginning in the late 1980s for some of the largest corporations in the world.

My systems have been used primarily to assure that complex federal regulations were applied evenly to the general public while simultaneously detecting and preventing fraud. These systems were used, and continue to be licensed, by some of the largest corporations in the world. My pattern recognition designs successfully detected and prevented fraudulent activity aimed at some of the largest bankcard portfolios in the United States. These designs were also credited with saving hundreds of millions of dollars. In addition, they were instrumental in AT&T's Universal Card subsidiary winning the Malcolm Baldrige National Quality Award, given by President George H. W. Bush. The Baldrige Award is given by the President of the United States to a manufacturing or service business or to an education or health care organization, that is judged to be outstanding in the seven areas of leadership; strategic planning; customer and market focus; measurement, analysis,

and knowledge management; human resource focus: process management; and results.

Relying upon my expert system designs, software, pattern recognition and fraud detection capabilities for its new account processing, this AT&T start-up grew to become the second largest bankcard company in the country in only several years before being acquired by its largest competitor, Citibank.

Since the early nineties, an underlying requirement of each of my projects which related to finance or securities was to comprehend, design, automate, audit and manage expert systems that interpreted complex Federal regulations as they pertained to various consumer activities. I gained additional pattern recognition and Fraud detection expertise by working closely with leading experts of the nation's banking industry, credit bureaus, MasterCard International, Visa USA, as well as from information provided to me by United States Secret Service agents, United States Postal Service Inspectors and others. My job was to combine my existing knowledge with that of the other experts and to automate the expertise into expert systems designed to protect multi-billion dollar bank portfolios.

I designed these expert systems to replicate the human actions taken by the experts, primarily in regards to fraud detection and credit processing. In each case, I was charged with the responsibility of assuring the complex regulations were applied uniformly to all consumer related transactions. I was

also ultimately responsible for all management aspects of the systems and the data that they processed. In addition, I was responsible for the logical and, in some cases, the physical security relating to the portfolios.

Prior to that I designed and ran systems that processed data for the United States Department of Justice and other government agencies. These systems also detected patterns ultimately used for expert systems' data recognition modules that I designed.

From 1997 to 2003, I focused on designing high-speed record access techniques. These designs are used to analyze billions of records in fractions of a second. They have universal application in any environment where pattern recognition is required, such as biometric identification associated with physical security products being considered for use at ports of entry into the United States.

Since December, 2003, I have conducted an investigation of the NFIP and focused my expertise upon finding the root cause or the problems within the insurance policy procurement practices and claims handling practices of the National Flood Insurance Program (NFIP). I used data from the investigation to determine patterns and practices found within the NFIP claims adjusting process. Based largely upon my findings, there have been two Congressional hearings into the NFIP with follow-up hearings as well.

The first hearing resulted in a directive that the Federal Emergency Management Agency (FEMA) review more than 24,000 flood claims - the largest such event in FEMA's history. It also resulted in President Bush signing into law a directive for the General Accountability Office (GAO) to determine "*The adequacy of the scope of coverage provided under flood insurance policies in meeting the intended goal of Congress that flood victims be restored to their pre-flood conditions, and any recommendations to ensure that goal is being met.*"

The second Congressional hearing included expert testimony from the publisher of the data that has been used by the NFIP adjusters to process flood claims. I found that NFIP adjusters were using new construction pricing in lieu of much costlier repair and renovation pricing. The publisher submitted testimony that read in part,

> *"Such use of our data was never intended by the publisher and, if used as is, would result in pennies on the dollar for insurance claims." He also wrote, "Moreover, leading the consumer to believe that new construction pricing represent a fair and complete valuation of their damages is, in my expert opinion, fraudulent."*

Construction and Renovation Experience

I acquired first-hand knowledge of the construction industry from building millions of dollars of residential and commercial improvements and structures. I have a comprehensive working knowledge of construction related trades, and the

complexities encountered with residential and commercial repairs, renovations and desiccant drying.

Management Experience

I have directed technical, management, administrative and clerical staff. Under my direction, they were responsible for interfacing with business customers, managing deadlines, quality control and continuously maintaining compliance with complex federal regulations on behalf of publicly traded entities. I have also managed construction related professionals and tradespersons, including but not limited to architects, structural engineers, plumbing and mechanical engineers, HVAC mechanics, electricians, drywall mechanics, flooring mechanics, raised flooring mechanics, mill workers, glazers, painters, roofers and specialty tradespersons.

Investigation of the National Flood Insurance Program

My investigation began by reading the Code of Federal Regulations, Title 44 Parts 61 and 62 as well as the several books incorporated by reference. Next, I shared my findings with the Maryland Insurance Commissioner and the United States Senate Committee on Banking, Housing and Urban Affairs (the Senate Banking Committee) staff, including evidence of low-ball adjuster practices. Acting largely upon my findings, the Senate Banking Committee directed FEMA to conduct an independent review of more than 24,000 Hurricane

Isabel flood claims - the largest such review in FEMA's history.

Ultimately I found that the review was conducted by many of the same firms and individuals that were involved in the low-balled claims in the first place. Despite the lack of independence, the Government Accountability Office reported that nearly half of the claims that were reviewed had been shorted by thousands of dollars each.

I collaborated with the Presidential Appointee charged with administering the National Flood Insurance Program, the Honorable Anthony Lowe, as well as Homeland Security's Undersecretary Michael Brown's Deputy Director, Mr. Trey Reid. I shared my findings with both men. At the direction of Mr. Lowe, I shared my preliminary findings with flood insurance industry officials and executives from across the country at their summit conference on March 25th and 26th, 2004. At Mr. Reid's request, I suggested and wrote draft policy statements for the NFIP. Subsequently, as a result of my findings, FEMA published a claims directive to the insurance industry in an attempt to correct errant flood claims handling practices.

To date, I have devoted more than 6,000 hours to investigating the NFIP. My investigation has included but has not been limited to the following:

- Reviews of flood victims' flood insurance claims from seventeen states and from multiple flooding events.

- On-site inspections of flood damaged residential properties in Pennsylvania, Maryland, Virginia, North Carolina, Florida and Mississippi.
- Review of the former Maryland Insurance Commissioner Steve Larson's Report regarding the response to Hurricane Isabel victims by insurance carriers.
- Telephone calls and meeting with former Maryland Insurance Commissioner Larson.
- Interviews with flood victims from twelve states.
- Interviews and meetings with FEMA officials.
- Meetings with Federal Insurance Administrator Anthony Lowe.
- Interviews with former Federal Insurance Administrator J. Robert Hunter.
- Interviews with former Federal Insurance Administrator Jo Ann Howard.
- Meetings with Alfred Redmer, Jr., Maryland Insurance Commissioner and National Association of State Insurance Commissioners Co-chair, Governmental Affairs.
- Meeting and calls with Diane Koken, Pennsylvania Insurance Commissioner and President of the National Association of State Insurance Commissioners and her counsel.
- Meetings with Tom Gallagher, Florida Chief Financial Officer.
- Telephone calls and meeting with FEMA's contractor - Computer Sciences

Corporation Vice President and Deputy General Counsel Harvey Bernstein.

- Interviews with Computer Sciences Corporation general adjusters and claims manager Joseph Buzzelli.
- Interviews. meetings and/or trips to discuss FEMA related problems and/or tour flood damage with elected federal and state officials, appointees and/or their staff from Alabama, California, New York, Pennsylvania, Maryland, Virginia, North Carolina, Florida and Mississippi.
- Review of the contract between Computer Sciences Corporation and the NFIP.
- Review of FEMA documents and transcripts from current and previous administrations.
- Review of hundreds of newspaper articles in the public domain.
- Written and oral testimony provided for the April 14, 2005 House Financial Services, Housing and Community Opportunity Subcommittee.
- Assisting local and national media with FEMA related issues, including the Baltimore Sun, the Washington Post, The San Francisco Chronicle, ABC NEWS and its Chief Investigative Reporter, Mr. Brian Ross, CNN, MSNBC and National Public Radio.
- Written testimony provided for the October 20, 2005 House Committee on Financial Services, Housing and Community Opportunity Subcommittee

Congressional Action

Congressional acceptance of my work has been acknowledged in, a) my participation in four Congressional hearings, b) a GAO investigation affirming my findings in the areas they investigated, c) planned additional Congressional hearings based in part upon my findings, d) multiple Congressional members' requests for a Department of Justice investigation and Congressional appeals to the Secretary of Homeland Security for intervention into the NFIP adjusting practices I have uncovered, e) a Congressional member's request for the President of the United States to personally issue a directive in regards to the NFIP claims handling practices and that "every appropriate action be taken to investigate the policy sales, use of premiums and claims handling practices carried out by the NFIP, its contractor and business partners," and; f) a Congressional member's request for the Secretary of Homeland Security to meet with me to "save valuable time in correcting problems within FEMA, save enormous tax dollars and most importantly, save disaster victims from across the country needless hardship and suffering."

Summary of Qualifications

I have twenty-two years experience in, a) designing expert systems, pattern recognition systems and fraud detection and prevention systems, and b) managing those systems for the purposes of assuring that data was processed in accordance with complex federal regulations and for safeguarding multibillion dollar portfolios from fraud, and; c) construction and management experience. My experience has provided me with a comprehensive background necessary to fully interpret the NFIP claims handling process, find problems within it and respond to Congressional requests for solutions to the NFIP's problems. The singular combination of disciplines in which I have gained experience over the years uniquely qualifies me to address on all fronts the issues pertaining to the disparities found between the NFIP regulations and the adjusting practices that insurance policyholders and others have experienced while attempting to settle NFIP flood loss claims.

S. Kanstoroom - Summary of Newly Discovered Evidence in the case of United States of America v. Donald Kennelly, Kenneth Ray Hyatt;
Prepared in Response to 11/18/05 Congressional Research Service Request

WRITTEN STATEMENT AND REPORT OF

STEVEN J. KANSTOROOM
PATTERN RECOGNITION AND FRAUD DETECTION EXPERT

TO THE CONGRESSIONAL RESEARCH SERVICE
LIBRARY OF CONGRESS

"SUMMARY OF NEWLY DISCOVERED EVIDENCE IN THE CASE OF THE UNITED STATES OF AMERICA V. DONALD KENNELLY AND KENNETH RAY HYATT"

NOVEMBER 19, 2005

Background

For the past two years I have investigated the Federal Emergency Management Agency (FEMA), its National Flood Insurance Program (NFIP), its contractor Computer Sciences Corporation (CSC) and FEMA's business partners including the Write Your Own (WYO) insurance carriers' insurance claims practices.

With the help of government and industry insiders, I have found significant wrongdoing, vast numbers of

underpaid claims and motives for the underpayments. I have worked very closely with two of Under Secretary Michael Brown's most senior officials and have many email chains to high ranking officials, including Mr. Brown. I have collaborated with key Congressional Committee members and reported some of my findings to Congress via oral and written testimony.

Overview

Shortly after Hurricane Isabel hit in September 2003, I found that FEMA, CSC and many of FEMA's private insurance company partners had been engaged in an elaborate scheme to low-ball disaster victims. The scheme has a direct bearing on the United States of America v. Donald Kennelly and Kenneth Ray Hyatt case.

In early 2004, I obtained several key admissions and a smoking gun document. I received very favorable press and whistleblowers started calling[1]. They also dropped packages for me throughout the Washington, DC metropolitan area. The packages contained evidence of the low-balling scheme.

A number of Congressional members, both Republican and Democrat, have written to the Secretary of Homeland Security, the Attorney General and ultimately one wrote to President Bush about my findings and urged immediate action. My findings included conflicts of interest within the NFIP that I believe lead to the substantive denial of

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[1] Baltimore Sun, March 28, 2004 "Advocate for the Storm Tossed"

insurance claims, adjuster training problems and other issues. Congress responded to many of the problems I found by holding a series of NFIP related hearings.

I have testified before Congress and submitted written testimony regarding FEMA and the NFIP and have written related interrogatories and document requests which Congressional members have submitted to FEMA. For six months, FEMA has thus far failed to respond to the Committee members' requests.

At the request of Congressman Michael Fitzpatrick (R-PA), who chaired the April 14, 2005 Congressional Hearing, I worked with the House Recording Studio to produce a twenty-seven minute video. The video can be viewed at http://www.femainfo.us/Fitzpatrick_Report.shtml. The video was designed to highlight some of my findings. It was intended to help catastrophe victims to avoid being low-balled on their insurance claims. I understand the video was televised on Comcast.

Nine months after Congresswoman Jo Ann Davis (R-VA) wrote to President Bush, the White House responded that no problems existed. Six days later Hurricane Katrina struck and soon thereafter evidence of the same low-balling tactics that have plagued prior flood victims began to emerge in the Gulf Coast states.

Overview of the United Stales of America v. Donald Kennelly and Kenneth Ray Hyatt

In 1996 Hurricane Fran caused extensive damage to the Ocean Dunes condominium complex in North Carolina.

According to the trial transcript and other materials I have received Ocean Dunes had purchased flood insurance through Seibels-Bruce, a WYO carrier. Mr. Ed Horne worked for Seibels-Bruce and was responsible for flood claims review.

Initially, Seibels-Bruce notified NFIP's contractor, Mr. Sterling Cook of Computer Sciences Corporation, that the loss could approach ten million dollars and requested assistance. Messrs Cook and Horne walked the Ocean Dunes property and noted significant damage.

Mr. Home hired an independent flood adjuster, Mr. Donald Kennelly, to adjust flood losses including Ocean Dunes. Mr. Kennelly worked on approximately 150 claims, including the Ocean Dunes loss over a period of months. Ultimately, Mr. Horne, Seibels-Bruce and CSC approved Mr. Kennelly's claims adjustments for Ocean Dunes which totaled more than six-million dollars.
Ocean Dunes hired a contracting firm operated by Mr. Kenneth Hyatt. Mr. Hyatt agreed to perform repairs in addition to the repairs covered by insurance. Mr. Horne, pleased with Mr. Kennelly's work, wrote him a letter of recommendation and continued working with him on subsequent storms.

The FEMA Inspector General's (IG) office conducted an investigation of the Ocean Dunes flood claims. According to numerous sources, the FEMA IG reviewed many of Mr. Kennely's files, yet found nothing out of order.

Central to the FEMA IG's Ocean Dunes investigation, and the subsequent indictments, were two misstatements of fact. First, the government witnesses mistakenly testified that the NFIP only pays for damages caused by direct water contact, second; government witnesses testified that amounts paid for certain line items exceeded amounts they believed were permitted to be paid under the NFIP or were otherwise unreasonably high.

In 2002 Messrs. Kennelly and Hyatt were indicted and subsequently convicted. They also each served more than seventeen months in federal prison and were ordered to pay millions of dollars in restitution. As I understand, neither of these men has the capacity to pay the restitution. Mr. Kennelly, a decorated Marine Corps Vietnam Veteran who had participated in numerous combat missions, and whom received the Purple Heart had never been in trouble. Likewise, Mr. Hyatt gained a top secret clearance in the Navy's nuclear weapons program and, I understand from the transcript, had never been in trouble.

Initial Contacts with the Department of Homeland Security, Office of the Inspector General

I early 2004 I begun providing NFIP related materials to the Senate Committee on Banking. Housing and Urban Affairs Committee. I was also cooperating with the Assistant United States Attorney and FBI, at their request.

Soon thereafter, I learned that both Messrs. Kennelly and Hyatt appeared to have been convicted based upon false and misleading testimony. I also learned that Mr. Kennelly had become well known in the flood adjusting community as the example of what happened to adjusters that failed to follow CSC's directives.

On February 24, 2004 Special Agent Jesse Weaver, Department of Homeland Security, Office of the Inspector General, Office of Investigations contacted me concerning NFIP information I had obtained.

On March 1, the FBI set up a meeting with me, Agent Weaver and his partner. Agent Weaver appeared to be very stressed. It was clear to me after several minutes that the purpose of the meeting was to convince me that no problems existed within FEMA. Agent Weaver was very defensive of the NFIP and became highly agitated as attempted to show him my findings. Included were documents regarding CSC's improper interpretation of coverage and pricing issues. In the first instance, CSC was incorrectly insisting that direct contact with flood waters was a prerequisite for payment under the

NFIP. In the second instance, CSC had developed prices guides, unique by State, each with artificially low prices. I did not realize until weeks later that both of these issues were central points in the Ocean Dunes case.

As Agent Weaver escalated, I asked why he had come. He said words to the effect of, "Mr. Shortley [NFIP Claims Director] was concerned about a Senate probe, a probe based upon information that you had provided to the Senate."

I inquired as to his relationship with Mr. Shortley, and: while he admitted knowing him for many years, Agent Weaver assured me that it would not be appropriate for him to pass any information regarding our meeting on to Mr. Shortley. The meeting concluded with Agent Weaver stating that the OIG's focus "is really on international terrorism" and he "did not believe his superior would authorize the dollars necessary to investgate anything where there was not a clear motive." Yet, at the start of the meeting Agent Weaver stated that he worked on NFIP issues and had for the past twenty years.

Agent Weaver's partner intimated that he was wholly unfamiliar with the NFIP. However, I later learned from DIG documents that he was involved with the Ocean Dunes investigation.

Within several hours I received a cell phone call from CSC's NFIP Flood Claims Manager, Mr. Joseph Buzzelli. Mr. Buzzelli said that he was calling at the request of Mr. Shortley, that Mr. Shortley was out of town, and he understood I had questions regarding

NFIP policies. Mr. Buzzelli was the supervisor of several of the general adjusters involved with the Ocean Dunes claims.

I shared this information with lawmakers. I have been told by multiple sources that Agent Weaver took an early retirement several months later.

On August 25, 2004, Mr. Erie Banks, Assistant Counsel for the Department of Homeland Security (DHS), Office of the Inspector General (OIG), phoned me. At the time I was working on an NFIP related story with a Fort Myers, Florida TV station, WINK TV.

Mr. Banks spoke to me via a speakerphone in a conference room with a number of people present with me, including the cameraman, anchor and producer. Mr. Banks told me it was unlawful for me to be in possession of documents or materials that implicated his agents or FEMA employees in wrongdoing. He insisted that it would be unlawful for me to share them with anyone. Mr. Banks told me to send him my materials and destroy any copies I had. A WINK TV cameraman videotaped the speakerphone call.

Witnesses to the call went to Capitol Hill and shared their concerns regarding Mr. Banks directives with Congressional members. Soon thereafter, Senators Allen (R-VA), Dole (R-NC), Mikulski (D-MD) and Sarbanes (D-MD) and Congresswoman Jo Ann Davis (R-VA) wrote to the United States Attorney General, John Ashcroft, and the Secretary of the Department of Homeland Security, Tom Ridge. The

Congressional members urged investigations and other actions. Attorney General Ashcroft and Secretary Ridge were already in the process of leaving public service and no apparent action was taken by them.

Congresswoman Davis then wrote to President Bush about the FEMA issues and DHS OIG's actions.[2] Attached to her letter was an affidavit from a law enforcement officer who transcribed a portion of the videotape. Also attached was a statement signed by three people who witnessed the call.

Several months later the first of several Congressional hearings were held that touched upon aspects of my investigation.

Newly Discovered Evidence

I understand that Mr. Kennelly was accused and convicted of including items on his adjuster's report for the Ocean Dunes condominium complex for items not covered under the Standard Flood Insurance Policy, such as items not contacted by flood waters, and for recommending prices higher than other adjusters felt were customary. I have information that refutes both of these points as is further described below.

I also have information as to how it is that the government witnesses came to provide the false and

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[2] Letter from Congresswoman Jo Ann Davis to President Bush dated 1/23/05 with attached affidavit from law enforcement officer and letter from witnesses to Congressional Members (date of witness letter has a typographical error on the date).

misleading testimony to the United States Attorney and Court.

Origin of False Testimony

The NFIP consists of a very complex set of rules and regulations. So much so that the company that has run the day-to-day affairs of the program for more than 18 years, Computer Sciences Corporation (CSC), was never mentioned once at trial, or in the trial exhibits with which I was provided.

Instead, the government witnesses wrongly believed that FEMA officials had been involved with the Ocean Dunes loss, when in fact it was actually a CSC employee such as Mr. Sterling Cook, for example, that government witnesses erroneously testified to as a FEMA employee.

This underscores the issue that a nearly impenetrable web of regulations surrounds the NFIP which has permitted many misconceptions about the NFIP to go uncorrected.

On March 28, 2004, the Baltimore Sun reported a statement by the Federal Insurance Administrator regarding the complexity of the NFIP.

"The National Flood Insurance Program relies on such a complex interaction of private insurance carriers, adjusting firms and third-party administrators that, despite decades of experience by top NFIP officials, no one in the program fully understood all the nuances of how the system works, said Federal Insurance Administrator Anthony S.

Lowe. But somehow, Lowe said, Kanstoroom has put together the big picture in a way that others haven't."

I believe the complexity of the program has permitted misstatements about the NFIP to go undetected by all but a select few. In this case, common misstatements regarding water contact and pricing guidelines, which were central issues in the trial of Messrs. Kennelly and Hyatt, were relied upon as fact.

The complexity of the NFIP has also allowed a training disparity to go undetected for years. The disparity consists of CSC's training sales agents to tell policyholders they will be compensated for the unbroken chain of events flowing from the loss and restored to their pre-flood condition, up to the policy limits; while simultaneously training claims adjusters to only allow narrowly defined coverage in limited amounts. I have attended the sales agent trainings and viewed adjuster trainings captured on videotape.

I shared my findings regarding the training disparity and other NFIP issues with CSC's Deputy General Counsel in the presence of several officials including an Assistant Attorney General of Maryland. The meeting is summarized in the attached letter from Maryland State Senator Grosfeld to me[3].

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[3] Letter from Maryland State Senator Grosfeld to Steven Kanstoroom Dated 12/02/04 re: Meeting with CSC Deputy General Counsel.

I also learned that CSC had written and implemented an audit procedure whereby they audited the WYO carriers, such as Seibels-Bruce. The audit included a provision whereby the WYO carrier could be penalized if it was found to have overpaid a claim. Penalties included but were not limited to the non-renewal of the WYOs agreement with the NFIP. Likewise, CSC could be penalized if a WYO failed its audit. This could perhaps explain why FEMA choose to exclude Seibels-Bruce and CSC from any responsibility in the Ocean Dunes case even though both firms were contractually obligated to review the claims in question.

Adjuster Credentials

Much weight was given during the trial to the government witnesses regarding their experience with the NFIP. I found that the NFIP did not have any adjuster training requirements, but merely certification requirements. The certification is designed to test basic knowledge of the NFIP and its insurance policies. The certification classes are conducted by CSC.

Recently I received an affidavit concerning an alleged fraudulent adjuster certification that was conducted by CSC following Hurricane Katrina. The affiant[4] stated that CSC's trainer gave the test answers to more than five-hundred adjusters, the majority of which had no adjusting experience. According to the affidavit, the untrained adjusters

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[4] Affidavit of Claims Adjuster and Attorney Alan L. Jackson dated September 21, 2005 – Submitted with S. Kanstoroom October 20, 2005 Congressional Testimony

were then "unleashed on unsuspecting flood victims."

Adjusters and flood victims often mistakenly believe that the CSC general adjusters are FEMA officials. As a result adjusters and victims have little reason to question the voracity of what the CSC general adjusters say.

Damages Are Covered Regardless of Water Contact

The government had a number of witnesses that testified that water contact was in effect a prerequisite for coverage. The witnesses used the "absence of water contact" to reason that line items, such as air-handlers and thermostats which where not directly contacted by flood waters were not covered under the flood policy. For example, Mr. Horne's testimony that appears on page 204 of the Court transcript is as follows:

Q. How' high up in a building, though, would the flood insurance cover'?
A. Whatever was touched by rising flood water.

Q. Rising flood water?
A. Correct.

Similar testimony by Mr. Thomas Vaughn appears in the transcript at several places including on page 1000 as follows:

Q. If water did not reach the interior, would it - would the flood insurance program cover the air handler units?
A. There would be no coverage because there'd be no damage to it from flood waters.

The Prosecutor, Ms. Darrow, stated on page 1093 in response to the Court:

Ms. Darrow: He's the wind adjuster, Your Honor, we have charged a conspiracy here and what has happened, as testified to by Mr. Vaughn is that certain items, for instance the air handlers, were included in flood that should have been wind. Now Kennelly included them and Coffman included them, and we are saying no.

That is incorrect. Water contact is not a prerequisite to payment under the NFIP and was not at the time of the loss nor was it at the time of the investigation, indictments or trial.

The "direct physical loss equates to direct physical water contact" concept originated in an Adjuster Claims Manual which CSC produced for the NFIP. It included a definition on page V-9 that incorrectly stated, "*Direct Physical Loss By or From Flood, Floodwaters must touch the insured property with the exception of seepage/hydrostatic pressure*[5]."

I found that no such regulation existed within FEMA and in March 2004, brought the inconsistency between the Code of Federal Regulations and the Adjuster Training Manual to the attention of the

[5] Adjuster Claims Manual dated 2002 page V-9

Federal Insurance Administrator and FEMA Deputy Director. FEMA issued a bulletin on May 7, 2004 alerting the WYO insurance carriers and adjuster community to a number of inconsistencies which I had brought to FEMA's attention, including the misnomer that the NFIP only pays for damages cause by water contact[6].

The former Federal Insurance Administrator Jo Ann Howard wrote to me about the issue of direct physical contact, specifically mentioning air-handlers[7]. Her letter reads in part,

During my tenure, and in prior administrations, the NFIP paid for the unbroken chain of events flowing from the flood loss, i.e. direct physical loss. That meant damage was restored as a result of its proximate cause - flood, regardless of contact with flood water. For example, when an air conditioning system's outdoor unit is torn from the building leaving its refrigerant lines open to contaminates, other components although not contacted by the flood waters are often affected. In such a case, the indoor air handler would also be covered inasmuch as it was part of a system and could no longer be deemed reliable - there being no way to wholly remediate the contaminates. To do any less was not consistent with our regulations.

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[6] May 7, 2004 NFIP Claims Guidance Memorandum from NFIP Director of Claims James Shortley to Write Your Own (WYO) Company Principal Coordinators, WYO Vendors, NFIP Servicing Agent, and Independent Adjusting Firms

[7] Letter from Former Federal Insurance Administrator Jo Ann Howard to Steven J. Kanstoroom dated March 7, 2005

Ms. Howard's tenure included the time frame when the Messrs. Kennelly and Hyatt were being prosecuted.

A FEMA whistleblower informed me that the FEMA General Counsel's office had not reviewed the CSC created Adjuster Training Manual.

Adjuster Software Used Artificially Low Prices; Price Determinations Vary

The government witnesses relied heavily on automated software programs to determine what they apparently believed were accurate prices and convinced the Court of their veracity. For example, Mr. Vaughn's testimony that appears on page 991 regarding pricing states as follows:

Q. All right. Now, this estimate that you prepared, what type of program did you use for that?
A. I used a DDS program, the same as Mr. Kennelly.

Q. Is that the Xactimate program?
A. No, that's not the Xactimate program. I'm sorry, did he use Xactimate? I thought he used DDS. I used the DDS program.

Q. Okay, is that program similar to -
A. Yes, it is.

Q. -- Xactimate?
A. The industry has several programs that adjusters use. The databases are pretty close, within

two or three cents of each other on most items, just about every item.

That is not what I found to be the case. I found a wide variation in prices that amounts to hundreds of percent.

I found that such programs are often used to low-ball insurance claims and I found the rationale for such low-balling tactics.

I learned that WYO carriers, such as Seibels-Bruce, write property insurance, for which they underwrite, as well as flood insurance, for which they don't.

These carriers and the adjusters that work for them often state that its is in their best interest to pay as much as they can on a flood claim, because they receive a percentage of the claim and the insurance proceeds do not come out of their pocket, but rather the NFIP's. However. I found an insurance industry incentive that supports a motive for the underpayment of claims whereby many in the industry fear that if they fairly settle a flood loss, it will set a precedent on the amount of their non-flood loss claims.

For example, if the going rate for sheet-rock is $2 per square foot, and the claims adjuster, who is often working for carriers that are also selling wind losses, pays $2 per square foot on the first floor where flood damage occurred, the homeowner will expect the same rate on the second floor where a tree fell through the roof as a result of the wind. The second floor damage would come out of the carrier's pocket.

As a result, the adjusters' "approved prices" are often far lower than the fair price necessary to complete the repairs.

The former Federal Insurance Administrator, J. Robert Hunter confirmed the precedent issue to me in a letter[8] to me and subsequently in an interview with me which aired on December 2, 2004 on CBS affiliate WINK TV in Ft. Myers, Florida. The televised interview is available at: http://www.femainfo.us/Multimedia_TV_Network_News_Wink_120204.shtml.

Software Developer's Congressional Testimony - Software Can be Used to Low-ball Claims

In January 2004, I found that computerized software, similar to the software that the government's witnesses, Mr. Ed Horne and Mr. Thomas Vaughn relied upon, was in many cases set-up to use artificially low prices.

In January 2004, Mr. Ed Horne forwarded such a claim with artificially low numbers to an elderly couple through his third-party adjusting company, Insurance Claims and Catastrophe Services (ICC). I spoke with Mr. Horne about the claim at the couple's request. His first proof of loss shows an adjustment of $20,196.43. Mr. Horne assured me his adjuster's figures were reasonable. Mr. Horne's number rose to $53,865.34 after I involved CSC and rose again by

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[8] Letter from Former Federal Insurance Administrator, Chief Actuary and Deputy Administrator under Presidents Ford and Carter, and Former Texas Insurance Commissioner, Mr. J. Robert Hunter to Steven J. Kanstoroom dated 11/18/04.

$16,684.96 to $70,550.30 after I brought the adjusting problems to the attention of senior FEMA officials.

The claims settlement regarding Mr. Horne's adjustment increased by nearly 350 percent, yet he assured me at every step of the way his numbers were fair and customary for the insurance industry. The process took over nine months, countless phone calls, the involvement of the presidentially appointed Federal Insurance Administrator and Deputy Director of FEMA to right Mr. Horne's low adjustment. The victims reported significant physical, financial and other problems as a result of nine month delay and their being forced to live in an unheated home while temperatures were in the teens.

I have other similar examples of Mr. Horne's work its consequences.

Mr. Horne refused to offer this particular couple a cash advance as required by the NFIP. Instead, he told me that the insurance company would not be interested in providing an advance payment because they were interested in settling the claim. In fact, the withholding of cash advances is one of the bases for a current class action law suit in the Fourth Circuit against the WYO Mr. Home's was servicing. It is also one of the bases for a separate multi-plaintiff action in the Fourth Circuit Moffett v. Computer Sciences Corporation, in which Mr. Horne's company ICC is named for allegedly low-balling flood victims. Both suits allege that adjusters withhold the advance payment as a means of forcing

cash strapped victims to accept less on their flood claims.

I learned that in many cases, adjusters were using new construction pricing in lieu of much costlier repair and renovation costs. The publisher of the data, Mr. Gary Moselle, wrote a letter to me confirming this practice on February 8, 2004[9]. The letter is attached and lists a number of examples where using such data results in the gross underpayment of insurance claims. Agent Weaver became highly defensive at the March 1, 2004 meeting when he read Mr. Moselle's letter.

On April 14, 2005, Mr. Moselle also submitted Congressional testimony[10] that confirmed my findings regarding artificially low software database prices.

Mr. Moselle's Congressional testimony states, in part:
In January 2004, I learned that our new construction pricing data was being used for the purpose of writing insurance estimates. I wrote the attached letter to pattern recognition and fraud detection expert, Mr. Steven Kanstoroom. The letter clearly states such use of our data was never intended by the publisher and, if used as is, would result in pennies on the dollar for insurance claims.

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[9] Letter from Gary Moselle, Publisher, Craftsman Book Company to Steven J. Kanstoroom dated 02/04/04 re: low-ball computerized pricing data.

[10] Gary Moselle, Publisher, Crafstman Book Company – Congressional Testimony Dated 04/04/05 re: Fraudulent Use of Claims Adjusting Software for Low-Balling Claims.

I learned Mr. Kanstoroom provided my letter to the Senate Banking, Housing and Urban affairs Committee. I also understand that, in large part based upon my letter, the Senate directed FEMA to conduct an independent review of all Hurricane and Tropical Storm Isabel Flood claims.

Subsequently, I understand FEMA issued a directive on May 7, 2004. The directive instructed adjusters to consider actual repair costs and estimates in addition to computer generated numbers.

The issue is not one of using computer generated pricing in the calculation of insurance estimates, but rather the use of the correct cost book. The fact is the cost of new construction is far less than the cost of repair and renovation - in some case by a factor of fifty times or more. For example, the time required to remove and replace a new plumbing trap in the event the wrong material was used, brass instead of copper for example, could be several minutes. On the other hand, had the pipe been in place twenty years it may well be impossible to remove the pipe without damaging the several components it is connected to, taking an hour or more and requiring several additional parts.

Several excerpts from my letter that ultimately went to the Senate Banking Committee are:

> • *Costs in the labor column are for normal conditions: experienced craftsman working on reasonably well-planned and managed new construction*

• Add 25% to 50% for work done following a major flood

• Estimates in the National Construction Estimator are costs to the installing contractor and do not include the contractor's overhead and profit. Typical markup on repair projects is 25% to 50%.

• If you are using this book as your sole cost authority for contract bids, you're reading more into these pages than the editors intend.

• Construction costs for repair, remodeling and renovation tasks are widely acknowledged in the industry to be higher than similar work on new construction tasks.

• Renovation and insurance repair work involves access, sequence and matching issues uncommon in new construction.

I understand from a number of articles in the public domain that insurance adjusters routinely take the position that they are not permitted to deviate from the electronic book of numbers. One such report was run on WLVK TV in Florida on September 13, 2004. For the reasons outlined above, taking such a position will result in a woefully inadequate reimbursement of damages, easily less than fifty percent of the actual repair cost.

Moreover, leading the consumer to believe that new construction pricing represent a fair and camplete

valuation of their damages is, in my expert opinion, fraudulent.

Contractors' Pricing Often Mirrors Adjusters' Pricing

I have received information regarding flood insurance claims from seventeen states. Similar to the Ocean Dunes case, I have found it very common for contractors to agree to perform the work for whatever the insurance adjuster writes.

However, in many cases I have also found a very wide disparity in prices offered by contractors, each claiming to restore the property to its pre-flood condition. In practice what often occurs is the contractor will agree to go along with a low-ball price to get his foot in the door. I believe this is what occurred with the Miller Construction Company with regard to the Ocean Dunes case.

Miller submitted a low bid that the prosecution used to imply that Mr. Kennely's prices on certain items were high. I have found that in many cases the contractor will tell flood victims that there is insufficient time to complete a comprehensive bid. Many contractors reason that with such localized damage they will be able to get more than enough work, and in fact routinely tell the flood victims just that.

Millers' estimator, Mr. Bruce McGuire's testimony on behalf of the government that appears on page 432 states as follows:

Q. Okay. So, it's an estimate, but could it be more?
A. It was a preliminary estimate.

Q. Preliminary estimate. And that's just, really all it was, isn't it?
A. It was based on all the information we could gather at the time, but it was preliminary, yes.

Q. And from those numbers, then you extrapolated to the entire complex, is that right?
A. That's correct.

Q. Now Mr. McGuire, you're not saying you saw the same damage to every single building out there, are you?
A. We did not. With the time - - with four days to prepare the estimate, that gave us enough time to intensely survey one unit and then weigh the other units against that model to come up with what we felt - - what we felt was a reasonable - - reasonable method to estimate the project.

Miller Construction Company ceased operations prior to the trial.

Once the contract is signed, in many cases the contractor will find "additional work" which the insurance company in many cases refuses to pay. In these cases, often the insured is then unable to complete the repairs on their home with life changing consequences.

I believe the materials discussed herein, which are supported by documents, emails and videotape, may

be significant and may assist those representing Messrs. Kennelly and Hyatt, and any others similarly situated, in determining whether a motion for a new trial on their behalf is justified.

I also believe these materials could benefit thousands of flood victims that have been wrongfully denied fair compensation for their flood losses as a result of adjusters being trained to believe that, a) water contact is a prerequisite for compensation under the NFIP, and: b) that insurance industry pricing equates with the true cost to restore flood damaged property to its pre-flood condition.

[ENTERED DECEMBER 22, 2003]

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 03-4287

DONALD KENNELLY,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 03-4296

KENNETH R. HYATT,
Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of North Carolina,
at Wilmington.
James C. Fox, Senior District Judge.
(CR-02-13)

Submitted: November 19, 2003

Decided: December 22, 2003

Before MICHAEL, TRAXLER, and SHEDD,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Thomas P. McNamara, Federal Public Defender, G. Alan DuBois, Assistant Federal Public Defender, Jeanette Doran Brooks, Raleigh, North Carolina; Sue Genrich Berry, Wilmington, North Carolina, for Appellants. Frank D. Whitney, United States Attorney, Anne M. Hayes, Assistant United States Attorney, Christine Witcover Dean, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Donald Kennelly and Kenneth R. Hyatt were both convicted by a jury of one count of conspiracy to defraud and to commit mail fraud against the United States, in violation of 18 U.S.C. § 371 (2000), and two counts of mail fraud and aiding and abetting mail fraud, in violation of 18 U.S.C. §§ 2, 1341 (2000).

In these consolidated appeals, Kennelly and Hyatt challenge the sufficiency of the evidence to support their convictions. First, they assert that the evidence was insufficient to sustain their convictions on the conspiracy count because the Government failed to prove the existence of a conspiratorial agreement between them or between either of them and any other person. Second, they assert that because a conviction on the conspiracy count was a necessary predicate to a conviction on the mail fraud and aiding and abetting counts, their convictions on these counts must also be reversed. They also claim that the insufficiency of the evidence was compounded by the district court's instruction on deliberate ignorance, even though the district court granted their requested version of the instruction. Because we conclude these assertions are meritless, we affirm.

In reviewing a sufficiency challenge, "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 315 U.S. 60, 80 (1942). This court "ha[s] defined 'substantial evidence,' in the context of a criminal action, as that evidence which 'a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'" *United States v. Newsome*, 322 F.3d 328, 333 (4th Cir. 2003) (quoting *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996) (en banc)). In evaluating the sufficiency of the evidence, this court does not weigh the evidence or review the credibility of witnesses, and where the evidence supports differing reasonable interpretations, the

jury decides which interpretation to believe. *United States v. Wilson*, 118 F.3d 228, 234 (4th Cir. 1997) (quotations omitted).

"The elements of the crime of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 are: (1) the existence of an agreement, (2) an overt act by one of the conspirators in furtherance of the agreement, and (3) intent to agree to defraud the United States." *United States v. Winfield*, 997 F.2d 1076, 1082 (4th Cir. 1993). The elements of a conspiracy to commit mail fraud are (1) the existence of an agreement to commit mail fraud, (2) willing participation by the defendant, and (3) an overt act by one of the defendants in furtherance of the agreement. *United States v. Edwards*, 188 F.3d 230, 234 (4th Cir. 1999).

To convict a defendant of fraud, the government must prove that he acted knowingly and willfully with the specific intent to deceive. *United States v. Schnabel*, 939 F.2d 197, 203 (4th Cir. 1991). "The willful blindness instruction allows the jury to impute the element of knowledge to the defendant if the evidence indicates that he purposely closed his eyes to avoid knowing what was taking place around him." *Id.* "Moreover, where the evidence presented in the case supports both actual knowledge on the part of the defendant and deliberate ignorance, a willful blindness instruction is proper." *United States v. Abbas*, 74 F.3d 506, 513 (4th Cir. 1996). "This circuit approves a willful blindness instruction when the jury is not permitted to infer guilty knowledge from a mere showing of careless disregard or mistake." *United States v. Guay*, 108 F.3d 545, 551 (4th Cir.

1997) (citing *United States v. Mancuso*, 42 F.3d 836, 846 (4th Cir. 1994)).

"By its very nature, a conspiracy is clandestine and covert, thereby frequently resulting in little direct evidence of such an agreement." *Burgos*, 94 F.3d at 857. "Indeed, a conspiracy may be proved wholly by circumstantial evidence." *Id.* at 858. Our review of the evidence convinces us that the evidence was sufficient to establish an agreement by Kennelly and Hyatt to defraud and to commit mail fraud against the United States. Moreover, we find that under the facts of this case, the district court's deliberate ignorance instruction was warranted. Because we find the evidence was sufficient to sustain Kennelly's and Hyatt's convictions on the conspiracy count, we need not decide whether a reversal of their convictions on this count would require a reversal of their convictions on the mail fraud and aiding and abetting counts.

Accordingly, we affirm Kennelly's and Hyatt's convictions and sentences. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

AFFIRMED